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Supreme Court, U.S.
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No. 04-28

In the Supreme Court of the United States

Dawn Akers, Kim Loranger, and United Automobile Aerospace, and Agricultural Implement Workers of America, Local 6000,

Petitioners,

v

Patricia L. Caruso, Robert Steinman, Marsha Foresman, Patricia Caruso, John Marshall, Edward Haggert, George Marra, William Overton, Edward Haggert, Ruth Bare, Frank Eisenhauer, Joseph Jereckos, John Makowski, Terry Pitcher, Kirk McVittie, Gwen Rodgers, in their Personal and Official Capacities, Jointly and Severally

Respondents.

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

I. The Michigan Department of Corrections has a rule prohibiting, with certain exceptions, its employees from having non-work-related contact with prisoners, probationers, parolees, and their family members because such contact could directly impact the safety and security of the citizens of the State of Michigan. Does this anti-fraternization rule unconstitutionally limit MDOC employees' freedom of association?

PARTIES TO THE PROCEEDING

The caption contains the names of the parties to the proceeding, except that Patricia L. Caruso, who is the current Director of the Michigan Department of Corrections, has been substituted pursuant to S. Ct. Rule 35.3 for the former Director, Kenneth McGinnis.

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BASIS FOR JURISDICTION

This is a civil rights action brought under 42 U.S.C. § 1983. The district court had subject matter jurisdiction because Petitioner raised a federal question. 28 U.S.C. § 1331. The Court of Appeals had appellate jurisdiction because Petitioner appealed from a final decision of the district court, which granted summary judgment in favor of Respondent. 28 U.S.C. § 1291. This Court has jurisdiction to review the judgment of the Court of Appeals. 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Michigan Department of Corrections has a Work Rule (the anti-fraternization rule) prohibiting its employees from having non-work-related contact with prisoners, probationers, parolees, and their family members because such contact could directly impact the safety and security of the citizens of the State of Michigan. The Court of Appeals described the anti-fraternization rule, Pet. App. 2a-3a:

> At all times relevant to this litigation, the MDOC has had an anti-fraternization rule barring employees from "Improper Relationships with Prisoners, Parolees or Probationers, Visitors or Families. "This Rule, originally known as Rule 12 [Pet. App. 123a], strictly prohibited "improper or overly familiar conduct with [offenders] or their family members or visitors." Violations of the Rule "subjected an employee to disciplinary action up to and including dismissal[]." A non-exhaustive list of improper actions included "exchange of letters, money or items, . . . cohabitation [except in case of a pre-existing marriage], being at the home of [an offender] for reasons other than an *official* visit without reporting the visit, . . . giving [offender] [employee's] home telephone number, [and] sexual contact of any nature." (emphasis in original). Furthermore, the anti-fraternization rule required reporting of "any contact made with [an offender], or their family member(s), outside the regular performance of an employee's job." In June 1996, Rule 12 was repromulgated as Rule 24 [Pet. App. 121a]. In September 1999, during the course of this litigation, Rule 24 was replaced by a substantially identical Rule 46 [Pet App. 118a]. Finally, in April 2000, Rule 46 was revised to

> clarify the definitions of family member and visitor and recognize the power of the MDOC to grant individual employees limited exemptions to the Rule [115a].

Petitioners are a current and a former employee of the Michigan Department of Corrections ("MDOC"), and their union. They sued the director of the MDOC, and numerous other MDOC administrators on the grounds that the MDOC rule violated their "clearly established rights to privacy, association, and due process guaranteed by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendment to the United States Constitution." Specifically, Petitioners sought reinstatement after discharge for violating the anti-fraternization rule, expungement from the plaintiffs' disciplinary records of any reference to a violation of the anti-fraternization rule, and compensatory and punitive damages. On cross-motions for summary judgment, the district court entered an opinion, order, and judgment holding that the anti-fraternization rule was constitutional and that the Respondents enjoyed qualified immunity. Pet. App. 48a, 56a, 57a.

Petitioner Loranger served as probation officer for Wayne County. She exchanged several letters with a prisoner serving a life sentence. After she realized she was in violation of the anti-fraternization rule, she notified her supervisor. Ultimately, the MDOC terminated her for her conduct. During the pendency of this lawsuit, a labor arbitrator reinstated her and imposed only a brief suspension. While this case was pending, Loranger repeatedly sought permission to have contact with a long-time friend, Rebecca Contreras. Loranger became pregnant and hoped Contreras would be her child's godmother. Contreras' son was on probation at that time so the MDOC refused permission for Loranger to have contact with her. The District Court granted a preliminary injunction permitting Contreras to attend the child's baptism. Loranger also sought permission to have contact with a woman named Stacey Artley who was on probation.

Petitioner Akers was a bookkeeper at the Chippewa Correctional Facility who befriended a prisoner. Upon the prisoner's release, she gave him a ride several hundred miles from her home to a job interview in Detroit. The MDOC terminated her employment. An arbitrator subsequently reinstated her and imposed only a brief suspension. The District Court never ruled in Akers' motion for injunctive relief because she transferred to Michigan's Department of Natural Resources.

In *Akers v. McGinnis,* 352 F.3d 1030 (6th Cir. 2003) (Pet. App. 1a), the Court of Appeals affirmed and upheld the anti-fraternization rule. The Court of Appeals examined the anti-fraternization rule under the substantive due process component of the Fourteenth Amendment and the First Amendment's freedom of association component.

Based on earlier Circuit authority, *Boals v. Gray*, 775 F.2d 686, 692 (6th Cir. 1985), the Court of Appeals concluded that Petitioner's freedom of association claim should be analyzed under the same standard as freedom of speech claims. The Court of Appeals applied *Pickering v. Board of Education of Township High School District 205,* 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1985), to analyze the Work Rule. The Court said, Pet. App. 9a:

> In *Pickering* and *Connick*, the Supreme Court created a test containing two levels of scrutiny. Restraints on government employee speech, or, as in the present case, government employee association, touching on a matter of public concern must meet the *Pickering* test balancing between the interests of the employee and the interests of the state. We have characterized this test as a "form of intermediate scrutiny." . . . Restraints on government employee speech, or government employee association, not touching on a matter of public concern, are subject merely

> to rational basis scrutiny. In either case, it is the court's task to apply the test to the facts. [Footnote omitted.]

The Court of Appeals carefully examined Petitioners' allegations in the complaint and concluded that they did not touch upon matters of public concern. It therefore applied the *Connick* rational basis analysis and upheld the Work Rule, Pet. App. 12a:

> Almost all conceivable association affected by the Rule and all association alleged to have been discouraged by the Rule do not touch on matters of public concern. Loranger wishes to have contacts with an old friend and her "Little Sister." Akers wishes to assist a probationer whom she befriended. While all of these impulses are entirely understandable, even laudable, they are purely private matters of little or no concern to the community as a whole. The plaintiffs also envision hypothetical situations in which they are prevented from contacting a union official who is also related to an offender. But even such hypothetical situations do not rise to the level of public concern because mere individual labor grievances are not matters of public concern.
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> * * *
>
> Thus, the actual associations denied to the plaintiffs, as well as hypothetical associations suggested in the plaintiffs' briefs, either do not touch on a matter of public concern, or [they touch on political activity that] may be otherwise restrained.
>
> The MDOC easily meets the rational basis test for the non-public association restrained by the anti-fraternization rule.

I. Under the unique factual situation presented here, certiorari is not warranted.

The facts of the case at bar do not present an issue on which this Court should grant certiorari because the instant case deals with an anti-fraternization rule crafted specifically for Department of Corrections employee contacts with convicted felons. It would be unwise for this Court to use this case to review associational rights generally when the facts involve only a very narrow segment of public employees, as to whom the rule is clearly legitimate.

The two principal cases relied upon by the Petitioners, *Boddie v. City of Columbus*, 989 F.2d 745 (5th Cir. 1993) and *Hatcher v. Board of Education and Orphanage*, 809 F.2d 1546 (11th Cir. 1987) are easily distinguishable from this case. *Boddie, supra*, concerned a fireman who sought to associate with another union member. Its applicability in this case is very limited because the Court of Appeals in *Boddie* did not have to consider the unique factual situation presented here. In this case, Respondents have enacted a broad prophylactic rule to protect Department of Corrections employees, convicted felons, and their family members from harm. That issue was not present in *Boddie*. Similarly, *Hatcher, supra,* is distinguishable from this case because it dealt with a woman who was allegedly denied a job because she protested school closings. She also attempted to bring her minister and a school board member to a placement meeting. The Court of Appeals in *Hatcher* was not faced with any of the security and safety conditions present in this case. Furthermore, the reasoning in *Hatcher* is highly suspect because it relied on a pre-*Connick* decision, *NAACP v. Alabama*, 357 U.S. 449 (1958), to reach the conclusion that *Connick* does not apply to associational claims.

Petitioners in the instant case are public employees who deal with convicted felons on a daily basis. The State of Michigan's

interest is at its zenith in restraining its employees' behavior when those employees deal with society's most dangerous members. It is inappropriate to compare a case such as this with other employees who do not deal with convicted felons.

This case is significantly different from those noted above. Respondents should be permitted to regulate the behavior of MDOC employees because of overriding security concerns as the Court of Appeals duly noted:

> Given the proven willingness of offenders to break the law, often violently, to reach their ends, on the one hand, and the near-plenary power over offenders entrusted to MDOC employees, on the other, the potential for exploitation of vulnerable offenders by MDOC employees, or vulnerable MDOC employees by offenders needs no elaboration. The MDOC's interest in preventing such exploitation is only somewhat attenuated in cases where the employee has no direct supervisory authority over the offender. Even clerical workers without any penal authority can by the mere manipulation of paperwork, greatly affect an offender's status for better or worse, or at least be pressured into attempting to do so. The inclusion of offenders' visitors and families into the class with whom contact is forbidden may be necessary to prevent the use of third parties to circumvent the harm on direct contact and influence. The MDOC's interest is clearly legitimate, and the rule is a rational means for advancing that interest. [*Akers, supra,* at 1039, Pet. App. 13a.]

The cases relied on by the Petitioners do not involve the security concerns at issue in the present case. The unique nature of dealing with convicted felons make this case a poor vehicle to decide the issues raised by the Petitioners.

Petitioners list a "parade of horribles" which might come about as a result of the anti-fraternization rule such as prohibiting

union members from engaging in union meetings, prohibiting attendance at Alcoholics Anonymous meetings, and prohibiting attendance at Parent-Teacher Association meeting if an offender or a family member of an offender attended the same meeting. However, none of those issues were before the District Court. Neither Loranger nor Akers directly experienced such issues. UAW Local 6000 simply submitted affidavits of potential harms that might occur if the anti-fraternization rule was upheld. None of those individuals referred to in the affidavits were parties to the suit other than through their association with UAW Local 6000. The Petitioners did not litigate any of those hypotheticals in the District Court. Petitioners did not point to any disciplinary action ever suffered by any of these hypothetical employees.

The hypotheticals proposed by the Petitioners suggest they are making a facial challenge to the anti-fraternization rule, but such a challenge cannot succeed. This Court has held that "[A] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Clearly, the anti-fraternization rule is constitutional under circumstances like those in the present case where the safety of the public is paramount.

Finally, whether the *Pickering* balancing test is applied to this case, or the rational basis test, the result would undoubtedly be the same. In applying the balancing test, the overwhelming public necessity to safely and fairly manage convicted felons clearly outweighs any individual interest in social connections, such as those at issue here.

The broad issue of public employee rights in general that Petitioners seek to have this Court consider is simply not presented in this case due to its unique factual circumstances. Therefore, certiorari is not warranted.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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